Liberty Ashes & Rubbish Co., Inc. ***and*** **John Parente.** Case 29–CA–19442

February 20, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

On September 16, 1996, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Liberty Ashes & Rubbish Co., Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer John Parente full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make John Parente whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision."

3. Substitute the following for newly lettered paragraph 2(c).

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because they engage in protected concerted activities, or because they support or engage in activity on behalf of Local 813, International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer John Parente full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make John Parente whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of John Parente, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

LIBERTY ASHES & RUBBISH CO., INC.

April M. Wexler, Esq., for the General Counsel.
Steven B. Horowitz and *Stuart Bochner, Esqs. (Horowitz & Associates, P.C.)*, of South Orange, New Jersey, for the Respondent.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed on August 24, 1995,[1] by John Parente, an individual (Parente), the Regional Director for Region 29 issued a complaint and notice of hearing on September 22, alleging in substance that Liberty Ashes & Rubbish Co. Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act by discharging Parente because he engaged in protected concerted activities of protesting on behalf of himself and other employees, Respondent's practice of deducting moneys from employee's paychecks to pay for property damage caused by employees, and because he sought support of Local 813, International Brotherhood of Teamsters, AFL–CIO (the Union or Local 813).

The trial with respect to the issues raised by the complaint was held before me in Brooklyn, New York, on March 13, 1996. Briefs have been filed and have been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation located in Jamaica, New York, where it is engaged in providing waste removal services for private commercial enterprises.

During the past year, Respondent purchased and received at its Jamaica, New York facility fuel, machinery, and other products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York.

Respondent admits, and I so find, that it is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. FACTS

Respondent is a private sanitation carter in the New York metropolitan area. The two principals of the company are Steven and Michael Bellino. Robert Shirlow is the general manager who is in charge of the day-to-day operations.

At the time of the relevant events, Respondent employed Kenny (LNU) as a dispatcher who was in charge of assigning work to the employees and to handle problems with respect to accounts and service.

Respondent and the Union had been parties to a collective-bargaining agreement which expired. At some point, undisclosed by the record, another Union filed a petition for representation seeking a broader unit. The Region found a broader unit appropriate, which decision was still on appeal in Washington as of the time of the hearing.

Subsequently, as a result of an article 20 proceeding, the other Union withdrew its petition. However, since the Region had found the recognized unit to be inappropriate, Respondent refused to bargain with the Union over terms of a renewal contract. However, Respondent continued to recognize the Union and apply the terms of the expired contract, including making payments to the union funds. Respondent also processed grievancies with the union representatives, but would not agree to arbitration, since there was no contract in existence.

Respondent's practice was to deduct up to $100 from an employee's paycheck per week for accidents that they have with Respondent's vehicles that requires money to be spent for repairs, until the amount of the repairs was paid off.

Parente began his employment for Respondent in mid-March. His job duties included driving a truck and picking up garbage from Respondent's customers. His salary was $10 per hour.

Shortly after his employment began, Parente was told by Ray Ross, a fellow employee, that after 30 days he would be eligible to join the Union, and he would have a pay raise and benefits at that time.

On April 11, Parente while backing up Respondent's truck, caught the side of a van owned by Champion Ambulette, and broke the glass on the van. Parente reported the accident to Kenny (LNU), who told Parente not to worry about it and Respondent would "take care of it." However, a week later, when Parente received his paycheck, $100 was deducted from his salary. Kenny informed Parente that the deduction was due to the damage caused by Parente to the van that he hit. Kenny told Parente that the total damages were over $300.

Parente made no comment to Kenny about the deduction. However, he did inform employee Ross about it. Ross told Parente that Ross had heard that Respondent had done it once before to another driver.

On May 1, at a Subaru dealership, Parente while backing up, hit a fence, bending the frame. After being informed of the problem, Kenny sent Parente and Ross back to the dealership to try to fix the fence. They were unable to do so. Later on that same day, Parente damaged Respondent's garage door with the truck.

On Friday May 5, after completing his route, Parente was told by Steve Bellino to come back later in the day to pick up his check, because the checks were not ready. At 11 a.m. Parente telephoned Ross, who lived near the plant, and asked him if the checks were ready. Ross informed Parente that Respondent had taken $100 out of Ross's check for the damage to the fence. While Parente and Ross discussed this action by Respondent, Parente did not tell Ross that he was going to discuss the matter with Bellino or any official of Respondent. Nor did Ross authorize Parente to speak to Respondent on his behalf.

Later on that day, Parente went to Respondent's facility, received his check, and noted that $100 had been deducted from his check as well. Parente asked Bellino why Respondent had deducted $100 from his check, since he only owed a few dollars to Respondent for the damage to the glass. Bellino replied that Parente owed Respondent for the damage that he did to the fence. Parente responded that he did not think that this is right and that Respondent had "no right to take money out of our check." Parente added specifically "I don't know why you took money out of Roy Ross's check. He wasn't even there when this happened."

Parente also told Bellino that Respondent had insurance that should be paying for these damages, and added that Respondent wouldn't be treating him like this if he was in the Union.

[1] All dates are in 1995 unless otherwise indicated.

Bellino replied that it was none of Parente's business about the insurance on the trucks, and told Parente to "get out," and that he would be called later.

At about 3 p.m. that same day, Parente received a phone call from Kenny. Kenny told Parente to return the keys to the garage and that Respondent did not need him any more. Parente replied that he would return the keys when he received his final check, and bills for the damage that he was forced to pay for.

The next day, Parente went to the facility and spoke to Kenny. Parente asked Kenny why he was being fired. Kenny did not answer Parente's question and simply demanded Respondent's key. At first Parente refused to give the key back until he received his check and the receipts, but then he acquiesced when Kenny promised to give him his check the next week along with the receipts.

A week later Parente again spoke to Kenny at the facility. As promised, Kenny did give Parente three receipts for the damages that he caused. They were a bill from (1) Champion Ambulette, dated April 11, 1995, for $319.34 for repair of the glass; (2) a bill from Rolling Steel Industries dated May 1, 1995, for repair of the garage door for $719.86; and (3) from Sutra Fence dated May 3, 1995, for $560 for repair of the fence. However, Kenny would not give Parente his final check because he still owed Respondent a lot more money for the damages that he caused. Parente told Kenny that he was going to file charges against Respondent with the Department of Labor for withholding money from his wages.[2] On May 18, Parente filed a charge with the New York State Department of Labor complaining about Respondent's action. Subsequently, as a result of a settlement with the Department of Labor, Respondent paid Parente $890.63 in satisfaction of his claim against Respondent.

Shirlow was Respondent's primary witness, and he testified concerning Respondent's decision to terminate Parente. According to Shirlow, he recommended that Parente be terminated after hearing from Kenny about the two accidents that Parente had on May 1. Additionally Shirlow referred to another alleged accident that Parente was involved with about a week before May 1, when he allegedly damaged the pole of a fence at T & T Motors. The incident did not according to Shirlow cost Respondent any out of pocket money, since he sent his welder to straighten out the problem. However, Shirlow asserts that he considered this incident, along with the three other accidents that Parente admited to when Shirlow spoke to Respondent's attorney on May 2.

Shirlow claims that he explained the situation to Respondent's attorney and said that "he cannot keep this guy." Shirlow also testified that he told the attorney that he was deducting money out of Parente's pay for a prior accident. The attorney, Shirlow asserts, instructed him that Respondent is not allowed to deduct money from salaries for accidents, and told him not to do it any more. The attorney also allegedly told Shirlow that he should fire Parente. That same evening Shirlow asserts that he recounted his conversation with the attorney to his bosses, Mike and Steve Bellino, and that they agreed with his recommendation to terminate Parente.

According to Shirlow the decision was made to wait until Friday, May 5, to terminate Parente since Friday was a payday and the end of the week. However, Shirlow was not going to be at the facility on May 5, so he allegedly asked Steve Bellino to terminate Parente. Shirlow further testified that Steve Bellino subsequently reported to him that he (Bellino) had terminated Parente, and there had been "a little bit of an argument," without any further details.

Shirlow also asserts that he had no knowledge of Parente ever having made a complaint to Bellino or anyone else in management about the deductions from his pay or said anything about the Union. Further, Shirlow claims that he did not even know whether Respondent made any further deductions from Parente's pay for accidents and that he did not tell Bellino that Respondent's attorney instructed him not to make such deductions.

Neither Steve Bellino, Mike Bellino, nor Kenny were called as witnesses by Respondent.

III. ANALYSIS

To find an employee's activity to be concerted, "it must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 443, 497 (1984). Moreover, concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986).

Whether Parente's interaction with Ross establishes that there was any intention to initiate or prepare for group action, or that Parente was to bring a "truly group complaint" to management, is highly questionable. I note in this connection that there is no evidence in the record that Parente had informed Ross that he intended to complain to management about Respondent's actions in deducting money from the salaries of Ross or himself, much less receive any authorization from Ross, implied or expressed, to speak to Respondent on Ross' behalf. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 685 (3d Cir. 1964).

However, I need not resolve the issue of whether Parente in fact engaged in concerted activity, because I conclude that the evidence establishes that Respondent discharged Parente in the belief that he acted with other employees in protesting working conditions, which is sufficient to render Respondent's conduct unlawful, regardless of whether Parente engaged in or intended to engage in concerted activities. *U.S. Service Industries*, 314 NLRB 30, 31 (1984); *Monarch Water Systems*, 271 NLRB 558, 559 (1989); see also *Salisbury Hotel Inc.*, 283 NLRB 685, 686 (1987).

Thus, when Parente made his complaint to Bellino about Respondent's deduction from his wages, he complained that Respondent's action was not right, and that Respondent had no right to take money out of "*our*" (emphasis supplied)

[2] Parente had visited the Union a few days after his discharge and was informed that it was illegal for Respondent to deduct money from his wages for accidents, and was advised to file charges with the Department of Labor about such action.

checks. He also made a specific reference to the fact that Respondent had taken out money from Roy Ross' check.[3]

These facts are more than sufficient for me to find, which I do, that Respondent believed that Parente was making a "group" complaint on behalf of himself and Ross about Respondent's action in making deductions from their salaries to pay for accidents. Thus Respondent believed that Parente was engaged in concerted activity when making such a complaint. *Office Professional Employees International Union*, 307 NLRB 264, 268 (1992) (Letter protesting employees' action used the word "our," to complain about directive that was issued. Activity found concerted.); *Bryant & Cooper Steakhouse*, 304 NLRB 750, 752 (1991), affd. 995 F.2d 257, 263–264 (D.C. Cir. 1993) (concerted activity found based in part on statement by employee, "*we* [emphasis supplied] are very unhappy about it," even though employee specifically denied being a spokesman for other employees when asked by employer); *Oakes Machine Corp.*, 288 NLRB 456 (1988), enfd. 897 F.2d 84 (2d Cir. 1990) (Letter of complaint consistently used the term "we," and referred to complaints such as "attitude towards employees." Found that a reasonable person would conclude that letter was the product of more than one person, although company discharged only the employee who sent the letter.)

Therefore I conclude that Respondent based on Parente's statements to Bellino, believed that Parente was making a group complaint to Respondent on behalf of and with the authority of Ross about Respondent's action in deducting money from their checks.

Moreover, I would also note that Parente made reference to the Union by stating that Respondent would not be treating him like this if he was in the Union. I find this remark of Parente to constitute concerted activity in and of itself, as it comprises an implicit threat to seek the assistance of the Union in regard to his complaint, as well as Parente's intent to become a member of the Union. This conduct, is therefore protected concerted activity, regardless of the connection to Ross' complaint. *Bryant & Cooper*, supra at 352; *B & P Trucking Inc.*, 279 NLRB 693, 698 (1986).

I am also persuaded that the General Counsel has established that the above conduct of Parente was a motivating factor in Respondent's decision to discharge him on May 5. Thus immediately after Parente made his complaints to Bellino as described above, including his reference to the Union, Bellino obviously became angered, and told Parente to get out and that it was none of his business about the insurance.

In this connection, Respondent argues that the fact that Bellino only made reference to Parente's comments about insurance being none of his business, and made no reference to the union comments of Parente, indicate that Bellino was not annoyed by Parente's statements concerning the Union or the practice of deducting money. I disagree.

All of Parente's remarks were directly related to the same subject that Parente was complaining about, and that Respondent believed was being made on behalf of Ross as well. Parente's comments about Respondent having insurance is clearly related to this complaint, as it is a justification for why he (and implicitly Ross) believe that it was not right for Respondent to deduct money from their salaries for accidents. Moreover, the comments made by Parente about the Union were also directly related to the complaint about the deductions, and threatened to enlist the support of the Union in protesting this practice. Thus the animus demonstrated by Bellino toward Parente's comments about the insurance cannot be separated from the clearly concerted or perceived concerted remarks of Parente about the Union and Respondent's conduct in deducting money from the wages of its employees.

Moreover, it is also significant that Parente was not yet a union member, and the evidence reveals that he would have received a salary increase plus increased benefits if he joined the Union. Since I have found that Parente's remarks suggested that he intended to join the Union, this provides another reason for Respondent to be upset with Parente's conduct, and additional evidence that Respondent was motivated by unlawful considerations in terminating him.

Most importantly of all, Parente was discharged on the very same day, after his conversation with Bellino, where he engaged in the above-described protected concerted conduct. Therefore the evidence is compelling that protected conduct engaged in by Parente was a motivating factor in Respondent's decision to terminate him. The burden then shifts to Respondent to establish by a preponderance of the evidence that it would have terminated Parente, about his protected conduct *Wright Line*, 251 NLRB 1089 (1980).

I do not believe that Respondent has met its burden in that regard. I note particularly the absence of any testimony by Steve Bellino, Respondent's official who allegedly approved the recommendation of Shirlow to discharge Parente, and who according to Shirlow's testimony notified Parente of Respondent's decision to discharge him.[4] It is also significant that Steve Bellino was the representative of Respondent to whom Parente made his concerted remarks and who demonstrated Respondent's hostility towards Parente for such conduct. The absence of testimony from Bellino in these crucial areas substantially detracts from Respondent's ability to meet its burden of proof.

I also found the testimony of Shirlow that Respondent had decided to discharge Parente on May 1, immediately after he had two accidents in 1 day, and before his concerted activity, to be unconvincing. In addition to the lack of corroboration from Steve Bellino who as noted, allegedly approved the decision prior to the concerted activity, it is also noted that Respondent waited several days after the accidents to notify Parente about the discharge. While Shirlow explained that Respondent acted on the advice of its attorney, and decided to wait until payday to notify Parente, this testimony does

[3] Respondent argues in connection with this comment, that since it was accompanied by a complaint by Parente that Ross was not there, this differentiates Parente's complaint about the deduction from his own pay, from the complaint about the deduction from Ross' pay. I find this to be a distinction without a difference. The ultimate issue is that Parente was making a complaint about Respondent's deduction from salaries of Ross and himself to pay for damages, and that Respondent reasonably believed that the complaint was made on behalf of both employees.

[4] In that regard I have found that consistent with Parente's unrebutted testimony, that he was notified by Kenny (LNU) of Respondent's decision to fire him. Since Respondent conceded that it discharged Parente, and conceded Kenny's limited agency status, I conclude that at least for the purpose of notifying and discussing Respondent's discharge with Parente, Kenny was an agent of Respondent.

not withstand scrutiny. Thus Shirlow admitted that his attorney notified him during the same conversation during which the attorney allegedly advised Shirlow to discharge Parente, that Respondent should no longer deduct money from the salary of employees for accidents. Yet Respondent, never the less continued to deduct money from the salaries of Parente as well as Ross, on the day of Parente's discharge. This evidence strongly suggests that contrary to Shirlow's testimony, no decision had been made to terminate Parente, until after his conversation with Bellino, when Parente engaged in the concerted conduct described above. This finding is further supported by the fact that when Bellino met Parente at the facility earlier in the day on Friday, May 5, but before Parente's protest about the deductions, Bellino said nothing to Parente about any decision to terminate him, but merely told him to return later in the day to pick up his check.

Moreover, I note that Respondent did not inform Parente of the reason for his termination at the time of his discharge, or thereafter when Parente specifically asked Kenny why he was being fired. *Pro/Tech Security Network*, 308 NLRB 655 fn. 2 (1992).

Finally, it is also significant that Respondent has not shown that it has ever discharged any employees because of excessive accidents. *Ellicott Development Square*, 320 NLRB 763, 776–777 (1996); *Aratex Services*, 300 NLRB 115, 116 (1990).

Accordingly, based on the foregoing, I conclude that Respondent had not shown that it would have terminated the employment of Parente, absent his protected conduct, and that therefore it has violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging John Parente on May 5, 1995, because he engaged in protected concerted activity and because of his activities in support of Local 813, International Brotherhood of Teamsters, AFL–CIO, Respondent has violated Section 8(a)(1) and (3) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily discharged John Parente, I shall recommend that Respondent offer him immediate and full reinstatement to his former job or a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him. All backpay provided shall be computed with interest on a quarterly basis in the manner described by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Additionally, I shall recommend that Respondent remove from its files any reference to the discharge of Parente, and to notify him in writing that this has been done and that evidence of same will not be used as a basis for future personnel actions against him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Liberty Ashes & Rubbish Co., Inc., Jamaica, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities, or because they support or engage in activity on behalf of Local 813, International Brotherhood of Teamsters, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer John Parente immediate and full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position without prejudice to the seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the discharge of John Parente and notify him in writing that this has been done and that evidence of the discharge will not be used as a basis for any future personnel actions against him.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Jamaica, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Re-

[5] If no exceptions are filed as proved by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 5, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.